

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2017AP001165 - CR

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02-13-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,
Plaintiff-Respondent,

v.

Sammy Joseph Hadaway,
Defendant-Appellant.

ON REVIEW OF AN ORDER DENYING A
PETITION FOR WRIT OF ERROR CORAM
NOBIS ENTERED ON MAY 30, 2017, HON.
JOSEPH DONALD PRESIDING, AND A
JUDGMENT OF CONVICTION ENTERED ON
MAY 14, 1996, THE HON. DIANE SYKES
PRESIDING IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY.

REPLY BRIEF
OF DEFENDANT-APPELLANT

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ARGUMENT

- I. Hadaway presents an error of fact crucial to his judgment of conviction, and these facts undermine confidence in Hadaway's guilt.

The parties agree on much. The State argues--- and Hadaway agrees---that an error of fact is "one that undermines our confidence that the defendant is actually guilty. Only errors of this magnitude justify the cost of putting aside the interest in finality." (States' Br. at 5)(quoting *United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016)). This error of fact must be "the type of defect that would have justified relief during the term of imprisonment." (States' Br. at 5)(quoting *United States v. Keane*, 852 F.2d 199, 203 (7th Cir. 1988)).

The parties, however, dispute whether the new evidence undermines confidence in Hadaway's guilt. Hadaway's opening brief detailed the extensive evidence that suggested Walter Ellis, labeled the Northside Strangler, murdered JP. These new facts include: (1) Ellis' conviction for the murder of seven other women; (2) Ellis' Sperm-DNA was found on JP; (3) the many similarities between the death of JP and Ellis' other victims; (4) Ellis' extensive criminal history; (5) officers had provided Hadaway with details of the crime. Further, no forensic evidence tied Hadaway and Ott to the murder.

The State does not dispute this evidence. In fact, the State's argument section makes one passing reference to Ellis. Instead, the State argues that the evidence may exculpate Ott of murder, but this same evidence does not exculpate Hadaway of attempted robbery. (St. Response 5-6). This argument is weak, because the State has consistently maintained that Ott and Hadaway "tried to rob the victim, but she had no money so Ott cut her throat." *State v. Ott*, 217

Wis.2d 290, 577 N.W.2d 387, 1998 WL 73104 (unpublished). The State often linked the murder and attempted robbery. The State filed a single criminal complaint to charge Ott and Hadaway, and the State filed a single information to bind-over Ott and Hadaway (2:1)(4:1). In the criminal complaint, the State alleged that the failed robbery motivated Hadaway and Ott to murder JP. (2:1-5).

This new evidence would be sufficient to grant a new trial if Hadaway remained in State custody. Hadaway would have strong claims for a new trial based upon newly discovered evidence or in the interest of justice. See generally *State v. Armstrong*, 2005 WI 119, 283 Wis.2d 639, 700 N.W.2d 98 (discussing the elements of new trials based upon both interests of justice and newly discovered evidence). Hadaway's co-defendant received a new trial based upon newly discovered evidence. *State v. Ott*, 2009 WI App 21, 316 Wis.2d 355, 763 N.W.2d 248 (unpublished). In 2008, this Court only knew that the DNA found on JP matched two anonymous profiles. *Id.* Based upon this limited, yet compelling evidence, this Court concluded "[t]his new evidence suggests that someone other than Ott may have killed Payne." *Id.*

Now, this Court has even stronger evidence. This Court knows the identity of Ellis, and the Court knows that he murdered eight other women in similar fashion to which JP was murdered. The Court also knows that polices provided Hadaway with all the information that appeared in his confession.

These facts undermine our confidence that Hadaway is actually guilty.

II. The State does not refute that the Court applied the incorrect standard of proof

The State does not refute several arguments that Hadaway raised in his opening brief. The State explicitly refuses to address whether the circuit court adopted the wrong burden of proof. The Circuit Court, both in its own words and adopting the State's position, repeatedly held that Hadaway could not conclusively prove his own innocence.

The State does not urge this court to adopt any burden; the State doesn't even offer to address the issue if requested by this court. Arguments left unrefuted in response to an appeal are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979); *State v. Dartez*, 2007 WI App 126, ¶ 6 n. 3, 301 Wis. 2d 499, 731 N.W.2d 340 (holding that a the failure of a response brief to dispute a proposition in appellant's brief may be taken as implicit concession of the proposition.).

III. The State fails to develop an argument that Ernst's perjury prohibition precludes Hadaway from receiving Coram Nobis Relief

Likewise, the State fails to adequately address whether *Ernst v. State* precludes Hadaway from relief. The State seems to agree that Hadaway committed perjury in Ott's trial, and that no one committed perjury in Hadaway's proceedings. Based upon these uncontested statements, the State simply concludes, in a few words, that Hadaway is ineligible for Coram Nobis relief.

Indeed, the State cites *Ernst* twice, once for the standard of review, second as a secondary cite. The State does not develop any argument, and this Court "do[es] not develop arguments for parties." *Clear Channel Outdoor, Inc. v. City of Milwaukee*, 2017 WI

App 15, ¶28, 374 Wis. 2d 348, 893 N.W.2d 24. See also *Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis.2d 148, 769 N.W.2d 82 (“[W]e will not abandon our neutrality to develop arguments” for the parties).

To be clear, Hadaway does not base his petition upon a claim that his accuser committed perjury. Hadaway bases his claim upon the new evidence about Ellis. In fact, Hadaway doesn't claim that any witness committed perjury in his case.

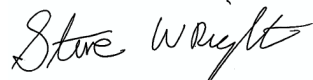
Therefore, this Court should hold that *Ernst* does not preclude Hadaway from Coram Nobis Relief. Because Hadaway's claim does not rest upon an accuser's recantation, and because Hadaway's claim rest upon new evidence, the Ernst perjury prohibition should not apply.

CONCLUSION

For these reasons, the Court should reverse the order of the Circuit Court, remanding with an instruction to grant the petition for the Writ of Coram Nobis.

Dated this 10th day of February 2018.

Respectfully submitted

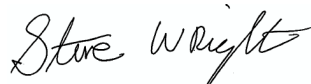


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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 974 words.

Dated this 10th day of February 2018.



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**CERTIFICATION AS TO COMPLIANCE WITH
809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February 2018.



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